In the High Court of Judicature at Madras

Dated: 02/07/2002

Coram

The Hon'ble Mr.Justice P.D.DINAKARAN

Second Appeal No.1730 of 1989

Anjalai Ammal ..Appellant

-Vs-

Mohamed Sali ..Respondent

Appeal against the judgment and decree dated 27.4.1989, made in A.S.No.141 of 1988 on the file of the learned District Judge, Cuddalore, against the judgment and decree dated 16.6.1988, made in O.S.No.370 of 1985 on the file of the learned District Munsif, Cuddalore.

!For Appellant : Mrs.Hema Sampath

^For Respondent : Mr.T.R.Rajaraman

:J U D G M E N T

When the above appeal was taken up for final disposal, Mrs.Hema Sampath, learned counsel appearing for the appellant, submits that she proposed to return the papers, as she had already intimated so to the appellant by registered post with acknowledgment due, the proof of which was also filed. The learned counsel for the appellant has also made an endorsement reporting "no instructions". In spite of the above notice to the appellant, the appellant neither filed a change of vakalat nor appeared in person. Since the second appeal is pending from 1989, considering the materials available on record, I pass the following order.

2. The appellant in the second appeal is the defendant in O.S.No.370 of 1985 laid by the respondent/plaintiff to declare the plaintiff's title, to direct the defendant to deliver vacant possession of the suit property to the plaintiff, and to pay the plaintiff mesne profits from January 1986 till the date of delivery of the suit property, which may be determined under Order 20 Rule 12 of the Civil Procedure Code.

3. According to the respondent/plaintiff, the suit property originally belonged to one Mohammed Yusuf Sahib, the great grand father of the plaintiff, who purchased the suit property from one Mohammed Abdul Kadir

Maraicar under a registered sale deed dated 25.3.1916, marked as Ex.A1. After the death of great grand father of the plaintiff, namely, Mohammed Yusuf Sahib, the plaintiff's father, namely, Mohammed Sheik Maroof Maraicar, took possession of the suit property and was paying kist, who by a registered settlement deed dated 22.10.1984 settled the suit property in the name of the plaintiff. Subsequent to the settlement deed dated 22.10.1984, the plaintiff was put in possession and enjoyment of the suit property. Alleging that, in spite of settlement deed dated 22.10.1984 in favour of the respondent/plaintiff, the appellant/defendant took possession of the suit property, the respondent/plaintiff laid the suit for declaring his title to the suit property and for recovery of vacant possession with mesne profits.

4. The suit was resisted by the appellant/defendant contending that the father of the respondent/plaintiff, namely, Mohammed Sheik Maroof Maraicar, mortgaged the suit property under five mortgage deeds, which are marked as Exs.B1 to B5, dated 29.6.1957, 19.7.1961, 8.5.1964, 12.10.1965, 8.9.1977 respectively, pursuant to which the appellant/ defendant was put in possession of the suit property. That apart, the appellant/defendant also contended that the father of the plaintiff and the appellant/defendant had entered into a sale agreement dated 1 1.12.1983, marked as Ex.A11 and the appellant/defendant is, therefore, entitled to continue in possession and seek for specific performance of the agreement dated 11.12.1983, marked as Ex.A11 and consequently, the respondent/plaintiff is not entitled for the relief as prayed for.

5. Upon the above rival contentions, the learned District Munsif, Cuddalore, framed the following relevant issues.

(i) Whether the plaintiff has got any right over the suit property?

(ii) Whether the settlement deed dated 22.10.1984 executed by the father of the plaintiff, namely, Mohammed Sheik Maroof Maraicar, in favour of the plaintiff, namely, Mohammed Sali, is valid in law?

(iii) Whether the defendant is in possession of the suit property?

(iv) Whether the plaintiff is entitled for declaration and injunction as prayed for?

6. The plaintiff examined himself as P.W.1 along with two other witnesses, namely, P.Ws.2 and 3, through them, 11 documents were marked as Exs.A1 to A11, of which, it is relevant to refer Ex.A1, namely, the sale deed dated 25.3.1916 executed in favour of the great grand father of the plaintiff, for purchase of the suit property, Exs.A3 to A7 – kist receipts stand in the name of the plaintiff's father to show the possession and enjoyment of the suit property by the plaintiff's father, Ex.A9 – kist receipt stands in the name of the plaintiff himself and Ex.A11 – the sale agreement entered between the father of the plaintiff and the defendant.

7. Per contra, the defendant examined herself as D.W.1 along with

another witness, through them, ten documents were marked as Exs.B1 to B10, of which Exs.B1 to B5 are the mortgage deeds dated 29.6.1957, 19.7.1961, 8.5.1964, 12.10.1965, 8.9.1977 respectively, executed by the father of the respondent/plaintiff in favour of the appellant/ defendant and Exs.B6 to B8 are the kist receipts.

8. The learned District Munsif, Cuddalore, after appreciating both the oral and the documentary evidence, found that even though the respondent/plaintiff's father mortgaged the suit property in favour of the appellant/defendant under Exs.B1 to B5 dated 29.6.1957, 19.7.1961, 8.5.1964, 12.10.1965, 8.9.1977 respectively, the said mortgages were discharged by the respondent/plaintiff. That apart, it is also found that the agreement of sale dated 11.12.1983, marked as Ex.A11, entered between the father of the respondent/plaintiff and the appellant/ defendant, was not fructified and further held that the settlement deed dated 22.10.1984, marked as Ex.A8, executed by the father of the respondent/plaintiff is valid in law and therefore, accepting the case of the respondent/plaintiff, decreed the suit and the same was, on appeal in A.S.No.141 of 1988 at the instance of the appellant/ defendant, confirmed by the learned District Judge, Cuddalore, by judgment and decree dated 27.4.1989. Hence, the above second appeal.

9. The second appeal was admitted on the following substantial questions of law:

(i) Whether in law the Courts below have not erred in overlooking that Ex.A8 has not been proved as required under Section 68 of the Evidence Act? and

(ii) Whether in law the Courts below ought not to have seen that the defendant had prescribed title by adverse possession as the possession of the defendant has been admitted by the plaintiff himself?

10. In this regard, I am obliged to refer Section 68 of the Indian Evidence Act, which reads as follows:

Section:68 – Proof of execution of document required by law to be attested: -

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

11. The proviso to Section 68 of the Indian Evidence Act, makes it clear that the respondent/plaintiff is under obligation to prove the execution of the settlement deed dated 22.10.1984, marked as Ex.A8, by examining one

attesting witness only if the execution of the said settlement deed, marked as Ex.A8 is specifically denied. In the written statement, I do not see any such specific denial of the execution of the settlement deed dated 22.10.1984. If that be so, it cannot be said that the respondent/plaintiff has not proved the settlement deed dated 22.10.1984, marked as Ex.A8 as true, as required under Section 68 of the Indian Evidence Act.

12. With regard to the claim of adverse possession of the appellant/defendant, I am obliged to refer the findings of both the Courts below that the appellant/defendant was put in possession of the suit property only pursuant to the mortgage deeds executed by the father of the plaintiff under Exs.B1 to B5 dated 29.6.1957, 19.7.1961, 8.5.1964, 12.10.1965, 8.9.1977 respectively, which were found to be discharged by the respondent/plaintiff. If that be so, the plea of adverse possession of the appellant/defendant is liable to be rejected, as the other contention based on the agreement of sale dated 11.12.1983 marked as Ex.A11 was also found to be not fructified.

Answering the substantial questions of law accordingly, this second appeal is dismissed. No costs.

Index :Yes
Internet:Yes
atr/sasi

To:

1.The District Judge,
Cuddalore (with records).

2.The District Munsif,
Cuddalore (with records).

Copy to;
The Section Officer,
V.R.Section, High Court,
Madras.